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Attorneys for Defendant Walmart, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

DON COPELAND, JOSEPH MURRAY,
CAROL SMITH, PATRICK WHITNEY,
PHILLIP HAGUE, DENISE FOTIS,
ROXANN DORIOTT, BRUCE MIMS,
LORI ABLY, TIMOTHY BROWN, PETER
COSTAS, AND MIKE BALLARD, on
behalf of themselves and those similarly
situated,

Plaintiffs,

v.

ENERGIZER HOLDINGS, INC.; AND
WAL-MART, INC.,

Defendants.

Case No. 4:23-cv-02087-HSG

**DEFENDANT WALMART, INC.'S
OPPOSITION TO PLAINTIFFS' MOTION
TO APPOINT INTERIM LEAD CLASS
COUNSEL**

Hearing Date: September 7, 2023

Time: 2:00 PM

Location: Courtroom 2, 4th Floor

Judge: Judge Haywood S. Gilliam Jr.

1 Counsel for a putative class of indirect purchasers of Energizer batteries ask the Court to
2 appoint them lead counsel. Plaintiffs' motion is unnecessary and should be denied.

3 Pursuant to Federal Rule of Civil Procedure 23(g)(3), the Court "may designate interim
4 counsel to act on behalf of a putative class" before certification "if necessary to protect the interests
5 of the putative class." *In re Nissan N. Am., Inc. Litig.*, No. 18-CV-07292-HSG, 2019 WL 4601557,
6 at *2 (N.D. Cal. Sept. 23, 2019) (Gilliam, J.) (quoting *Wang v. OCZ Tech. Grp., Inc.*, No. C 11-
7 01415 PSG, 2011 WL 13156817, at *2 (N.D. Cal. June 29, 2011)). The "typical situation[s]
8 requiring appointment of interim class counsel" are "where a large number of putative class actions
9 have been consolidated ... in a single court," where "a gaggle of law firms [are] jockeying to be
10 appointed class counsel," and where there is "rivalry between ... firms" or "uncertainty as to their
11 respective roles." *In re Nest Labs Litig.*, No. 14-cv-01363-BLF, 2014 WL 12878556, at *1-2 (N.D.
12 Cal. Aug. 18, 2014) (citations omitted).

13 None of those situations are present here. Three cases have been filed in this District, but
14 the complaints allege different putative classes. Plaintiffs' counsel here is the only firm seeking
15 to represent indirect purchasers in this Court. There is also "no rivalry between the firms or signs
16 that a rivalry exists: instead, the firms have already demonstrated their ability to cooperate and
17 work together." *In re Nissan*, 2019 WL 4601557, at *2; *see* Mot. at 8 (Plaintiffs' counsel has "a
18 close working relationship with the law firms that have filed related cases"). Indeed, the
19 substantive allegations in the complaints are identical, and the cases were filed in a coordinated
20 fashion. *See* Mot. at 2 (Plaintiffs filed "at the same time as the Direct Purchaser Plaintiffs").¹

21 Where, as here, "there are no competing lawsuits or firms, courts in this district have been
22 unwilling to appoint interim class counsel." *In re Seagate Tech. LLC Litig.*, No. 16-CV-00523-
23 RMW, 2016 WL 3401989, at *3 (N.D. Cal. June 21, 2016) (collecting cases); *see also, e.g., In re*
24 *Nissan*, 2019 WL 4601557, at *2 (Gilliam, J.) (denying motion to appoint interim class counsel
25 because "[i]t is not necessary to appoint interim class counsel merely to maintain the status quo"

26
27 ¹ Notably, counsel for neither of the putative direct purchaser classes have moved to appoint
28 interim counsel—underscoring that appointment of lead counsel is not "necessary at this stage to
protect the interests of the putative class." *In re S.C. Johnson & Son, Inc. Windex Non-Toxic Litig.*,
No. 20-CV-03184-HSG, 2020 WL 6081722, at *1 (N.D. Cal. Oct. 15, 2020) (Gilliam, J.).

(internal quotation marks omitted)); *In re S.C. Johnson & Son*, 2020 WL 6081722, at *1 (Gilliam, J.) (denying motion to appoint interim class counsel where appointment was “not necessary to address any live conflict among counsel or to clarify their respective roles in the litigation”).

Plaintiffs’ unpublished cases do not support a different result. *See* Mot. at 2-3. The motions at issue in *In re: Da Vinci Surgical Robot Antitrust Litig.* and *Yuen v. IDEXX Labs., Inc.* were unopposed. *See* Unopposed Mot. for Appointment of Interim Co-Lead Couns., *In re: Da Vinci Surgical Robot Antitrust Litig.*, No. 3:21-cv-03825-VC (N.D. Cal. Aug. 27, 2021), ECF No. 50; Unopposed Mot. to Appoint Interim Co-Lead Class Couns., No. 3:22-cv-04297-TLT (N.D. Cal. Aug. 22, 2022), ECF No. 32; *see also In re Seagate*, 2016 WL 3401989, at *3 (plaintiffs’ cases were distinguishable because “the motion to appoint interim lead counsel was unopposed”).

The Court should deny Plaintiffs’ motion and “wait to consider the adequacy of representation and appointment of class counsel” if and when Plaintiffs seek class certification and the Court has the benefit of the parties’ full briefing under Rule 23. *See Evans v. ZB, N.A.*, No. 2:17-CV-01123-WBS-DB, 2020 WL 6526245, at *2 (E.D. Cal. Nov. 5, 2020).

Dated: June 23, 2023

Respectfully submitted,

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